

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL CARE, INC.

and

Case 2--CA--20054

DISTRICT 1199, NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES, RETAIL,
WHOLESALE, DEPARTMENT STORE UNION, AFL--CIO

DECISION AND ORDER

Upon a charge filed by the Union 1 December 1983, the General Counsel of the National Labor Relations Board issued a complaint 29 December 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 5 October 1983, following a Board election in Case 2--RC--19216, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "'record'" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); Frontier Hotel, 265 NLRB 343 (1982).) The complaint further alleges that since about 13 October 1983,¹ the Company has refused to bargain with the Union. The Company timely filed an answer admitting in part and denying in part the allegations in the complaint.

¹ Although the complaint alleges that the refusal to bargain occurred since about 13 October 1983, we find, based on the allegations in the General Counsel's Motion for Summary Judgment, that the refusal occurred since about 27 October 1983.

tally of ballots showed that of approximately 536 eligible voters, 106 cast valid ballots for and 18 against the Union; there were 64 nondeterminative challenged ballots. The Respondent filed timely objections to the election. On 24 August 1982 the Regional Director issued a Supplemental Decision, overruling Objections 1, 2, and 4 of Group 1 and ordering a hearing on the remaining objections. On 14 September 1982 the Respondent filed with the Board a request for review of the Regional Director's Supplemental Decision. On 16 November 1982 the Board denied the Employer's request for review. On 6 May 1983 the hearing officer issued a Report on Objections, recommending that certain of the Respondent's objections be overruled, but that other objections be sustained and that the results of the election be overturned. The Respondent and the Union each timely filed exceptions to the hearing officer's report, but the Union later withdrew its exceptions. On 27 July 1983 the Acting Regional Director issued a Supplemental Decision, adopting the hearing officer's report and directing a second election. On 9 August 1983 the Respondent filed a request for review of the Supplemental Decision and Direction of Second Election, which the Board denied 24 August 1983.

On 25 August 1983 a second election was held pursuant to the Direction of Second Election. The tally of ballots shows that of approximately 378 eligible voters, 121 cast valid ballots for and 24 against the Union; there were 11 nondeterminative challenged ballots. The Respondent timely filed objections to the second election. On 5 October 1983 the Regional Director issued a Second Supplemental Decision and Certification of Representative, in which he overruled the Respondent's objections. On 26 October 1983 the Respondent filed with the Board a request for review of the Regional Director's Second Supplemental Decision and Certification of Representative.

By letter dated 13 October 1983, the Union requested the Company to bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated 27 October, the Company refused to bargain with the Union, stating that the Union's certification is "'currently under appeal.'"

On 18 January 1984 the Board denied the Company's request for review of the Regional Director's Second Supplemental Decision and Certification of Representative.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

On 9 April 1984 the General Counsel filed a Motion for Summary Judgment. On 11 April the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Company's answer denies, inter alia, the complaint's allegations that the unit is appropriate for collective-bargaining purposes, that the Union was certified as the collective-bargaining representative of the unit and is the exclusive representative of the employees in the unit, that about 13 October 1983 the Union requested the Company to recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and that since about 13 October 1983 the Company has failed and refused to recognize or bargain with the Union as the exclusive collective-bargaining representative of the unit employees. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 2--RC--19216, reveals that on 17 December 1981 Petitioner filed with the Regional Director a petition for certification as the exclusive collective-bargaining representative of all home health aides employed by the Respondent. On 18 March 1982 after a hearing, the Regional Director issued a Decision and Direction of Election, directing an election in a unit of home health aides and home health aide trainees. On 7 April 1982 the Company filed a request for review of the Regional Director's Decision and Direction of Election, which the Board denied 4 May 1982. On 14 May 1982 the Company filed a motion for reconsideration of the denial, which the Board denied 24 May 1982. On 2 August 1982 an election was conducted. The

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time home health aides and home health aide trainees, employed by Respondent from its 207 East 45th Street, New York, New York, facility, but excluding all other employees, office clerical employees, licensed practical nurses, registered nurses, guards and supervisors as defined in the Act.

(b) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Findings of Fact

I. Jurisdiction

The Company, a New York corporation with offices and places of business in Florida and New York, provides home care services. It has gross annual revenues exceeding \$500,000, and annually provides services valued in excess of \$50,000, directly to organizations which are engaged in interstate commerce and meet a Board standard for the assertion of jurisdiction other than indirect inflow or outflow. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following second election held 25 August 1983 the Union was certified 5 October 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time home health aides and home health aide trainees, employed by Respondent from its 207 East 45th Street, New York, New York, facility, but excluding all other employees, office clerical employees, licensed practical nurses, registered nurses, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 13 October 1983 the Union has requested the Company to bargain, and since 27 October the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 27 October 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Professional Care, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

10 July 1984

Donald L. Dotson,

Chairman

Don A. Zimmerman,

Member

Patricia Diaz Dennis,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL--CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time home health aides and home health aide trainees, employed by us from our 207 East 45th Street, New York, New York, facility, but excluding all other employees, office clerical employees, licensed practical nurses, registered nurses, guards and supervisors as defined in the Act.

PROFESSIONAL CARE, INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Jacob K. Javits Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone 212--264--0360.